

J. C. Brock Corporation and United Food and Commercial Workers, District Union Local One, AFL-CIO. Case 3-RC-10189

August 17, 1995

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

The issue presented here is whether the Acting Regional Director correctly recommended sustaining one of the Petitioner's objections and setting aside the results of a representation election on the ground that the use of separate ballots in English and Vietnamese created a doubt about the fairness and validity of the election process.¹ The Board has reviewed the record in light of the Employer's exceptions and brief and the Petitioner's memorandum in response and has adopted the Acting Regional Director's findings and recommendations,² only to the extent consistent with this decision. For the following reasons, we reverse the Acting Regional Director and find that, in the circumstances present here, the use of separate language ballots does not warrant the setting aside of the election. Accordingly, we shall overrule the Petitioner's Objection 2 and certify the results of the election.

The relevant facts are not in dispute. Shortly before the election, the Employer's attorney informed the Regional Office that there were three employees on the voter eligibility list who spoke only Vietnamese and requested that the Regional Office prepare ballots in Vietnamese for these voters. Because the Regional Office prepared separate ballots in English and Vietnamese, the Board agent conducting the election asked each voter whether he or she needed an English or Vietnamese ballot. The Board agent gave three employees ballots in Vietnamese. Two of these ballots were marked "No" and the third ballot contained no mark and was declared void.

The Acting Regional Director found merit in the Petitioner's Objection 2, in which the Petitioner maintains that by its use of separate English and Vietnamese ballots the Board failed to preserve the voters' right to cast secret ballots. Initially, the Acting Regional Director observed that when foreign language ballots are needed, the Board traditionally places all

the languages on each ballot in order to avoid creating the impression that separate foreign language ballots would be used to determine how a particular group of employees voted. Because of the Regional Office's "mistake" in preparing separate language ballots, however, the Acting Regional Director observed that the Board agent was required to ask each voter whether he or she needed a Vietnamese language ballot. From this, the Acting Regional Director found that the use of separate ballots for the Vietnamese voters compromised the objective of voter confidence in a secret election because the use of separate ballots "could have caused concern among the Vietnamese voters that their votes would not be secret or that the use of separate ballots would allow the parties to measure the sentiments of a particular employee group." The Acting Regional Director further found that because the other employees knew that the Vietnamese voters "were being singled out as a voter group," they may also have had doubts about the fairness of the election process. Citing *Paprikas Fono*, 273 NLRB 1326 (1984), for the proposition that a regional office's departure from established procedures that creates a doubt about the fairness and validity of the election process requires that the election be set aside even absent proof that the departure from such procedures actually affected the election results,³ the Acting Regional Director recommended that the Petitioner's Objection 2 be sustained and that a second election be held.

Contrary to the Acting Regional Director, we find that the Regional Office's "mistake" in not using multilanguage ballots here did not raise "a reasonable doubt about the fairness and validity of the election" that would require the election be set aside.⁴ Initially,

³ In *Paprikas Fono*, the Board ordered an election set aside because, contrary to the General Counsel's guidelines for the handling of determinative challenged ballots set out in the NLRB Case-handling Manual, (Part Two), Representation Proceedings, Sec. 11360, the Board agent waited until the day after the election to seal the determinative challenged ballots in a large envelope and did so outside the presence of the parties' representatives. Further, in preparation for the hearing in the case, regional office personnel opened the sealed envelope, again outside the presence of the parties' representatives, to check on the condition of the challenged ballot envelopes. Because the Board's established procedure for the handling of determinative challenged ballots was not followed, the Board reasoned that the parties could not monitor the safeguarding of the determinative challenged ballots and assure themselves that they were secure. The Board therefore found that the manner in which the election was conducted raised a "reasonable doubt as to the fairness and validity of the election."

⁴ As the Board stated in *Polymers, Inc.*, 174 NLRB 282, 282 (1969):

The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election. [Fn. omitted.]

¹ The National Labor Relations Board, by a three-member panel, has considered the objections in an election held on October 6, 1994, and the Acting Regional Director's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 43 for and 62 against the Petitioner, with 2 void and 1 challenged ballots, an insufficient number to affect the results.

² In the absence of exceptions, the Board adopts, pro forma, the Acting Regional Director's recommendation to overrule the Petitioner's Objection 1.

find that the Acting Regional Director's suspicion that the voters who used English language ballots may have been affected by the use of separate language ballots is too speculative to sustain a reasonable doubt as to the fairness and validity of the election. As the Board stated in *Transportation Unlimited*, 312 NLRB 1162, 1162 (1993), "it requires more than mere speculative harm to overturn an election." Thus, only the three voters who used the Vietnamese language ballots might have been affected by the use of separate language ballots in the election because they were concerned that the parties would find out how they voted. We observe, however, that the secrecy of the election process was not in fact violated because one of the three Vietnamese ballots was voided and it was therefore impossible to determine which employees cast the ballots marked "No."

ERR14 Also contrary to the Acting Regional Director, we find the fact that the three Vietnamese language ballots were not determinative of the election is a relevant consideration in deciding whether to hold a new election.⁵ Here, where we have found that 105 of

⁵ See, e.g., *Bridgeport Fittings*, 288 NLRB 124, 125 (1988), *affd.* 877 F.2d 180, 187 (2d Cir. 1989). In *Paprikas Fono*, *supra* at 1329, the Board found that a reasonable doubt regarding the validity of the election was raised in part by the fact that the irregularities there "involved a sufficient number of ballots to affect the election results." In *Rheem Mfg. Co.*, 309 NLRB 459, 461 fn. 11 (1992), the Board distinguished *Paprikas Fono* on the ground, *inter alia*, that the challenged ballots in *Rheem* were not determinative and found that a reasonable doubt as to the fairness and validity of the election had

the 108 employees who voted in the election were not affected by the use of separate language ballots, and where a change in the three Vietnamese language ballots would not have affected the results of the election, we cannot find that the use of separate language ballots raised a doubt about the fairness and validity of the election.⁶ For all these reasons, we shall overrule the Petitioner's Objection 2 and certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of the valid ballots have not been cast for United Food and Commercial Workers, District Union Local One, AFL-CIO, and that it is not the exclusive representative of these bargaining unit employees.

not been raised. Thus, in determining whether a new election should be held, the Board has found relevant whether the ballots at issue are determinative of the election.

⁶ *Paprikas Fono*, *supra*, is also distinguishable on the ground that the conduct found objectionable there was a deviation from the General Counsel's guidelines for the handling of determinative challenged ballots as set out in the Board's Casehandling Manual. By contrast, while the Board has traditionally used multilanguage ballots in elections when foreign language ballots are needed, the use of such ballots is not discussed in the Board's Casehandling Manual. Thus, the use of separate language ballots here was not a departure from established Board guidelines. Further, as the Seventh Circuit has observed, the Board has left it to its Regional Directors to decide whether to use multilanguage ballots, ballots in different languages, or English ballots plus election notices in other languages. *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1164 (7th Cir. 1990).